IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Appeal number: A 85/2015

In the matter between:

MAHLABA AARON ZULU **APPELLANT**

And

THE STATE **RESPONDENT**

CORAM: MOCUMIE, J *et* MURRAY, AJ

HEARD ON: 31 AUGUST 2015

JUDGMENT BY: MURRAY, AJ

DELIVERED ON: 10 SEPTEMBER 2015

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[1] This is an appeal against the effective sentence of 30 years imprisonment imposed on the Appellant on 11 June 2013 in the Regional Court, sitting at

Bloemfontein, after his conviction on several charges of Housebreaking with Intent to Rob and Robbery with Aggravating Circumstances, Housebreaking with Intent to Steal and Theft, Attempted Murder, Kidnapping and Sexual Assault. The Appellant was granted leave to appeal against the said sentence.

[2] The Appellant was convicted on ten of the twelve charges against him and was sentenced to a total of 100 years' imprisonment, as follows:

12.1	Count 1:	Housebreaking with Intent to Steal and Theft	– 5 years;
12.2	Count 2:	Housebreaking with Intent to Steal and Theft	– 5 years;
12.3	Count 3:	Housebreaking with Intent to Rob and Robbery with Aggravating Circumstances	– 15 years;
12.4	Count 4:	Housebreaking with Intent to Rob and Robbery with Aggravating Circumstances	– 15 years;
12.5	Count 5:	Sexual Assault	– 5 years;
12.6	Count 6:	Housebreaking with intent to Rob and Robbery with Aggravating Circumstances	– 15 years;
12.7	Count 7:	Kidnapping	– 10 years;
12.8	Count 8:	Housebreaking with Intent to Steal and Theft	– 5 years;
12.9	Count 10:	Housebreaking with intent to Rob and Robbery with Aggravating Circumstances	– 15 years;
12.10	Count 11:	Attempted murder	– 10 years.

[3] The court *a quo* then reduced the effective sentence to a total of 30 years' imprisonment by ordering the sentences to be served concurrently as follows:

(a) Counts 1, 2 & 8 to run concurrently with Counts 3, 4, 6, & 10.

(b) Counts 5, 7 & 11 to run concurrently with Counts 3, 4, 6 & 10.

(c) Counts 3 & 4 to run concurrently with Counts 6 &10.

[4] Mr van der Merwe, for the Appellant, averred that the effective sentence of 30 years' imprisonment was harsh, even taking into account the number of charges and the gravity of the type of crime of which the Appellant has been convicted. He alleged that the trial court had erred in two respects, namely by failing to take into proper consideration the Appellant's personal and mitigating circumstances and over-emphasising the aggravating circumstances to the Appellant's detriment, and therefore imposed a sentence which was shockingly inappropriate in view of the Appellant's personal circumstances and all the mitigating factors.

[5] Mr Hoffman, on behalf of the State, supported the sentence. He argued, with reference so **S v RABIE**[1] and **S v OBISI**[2] that the court hearing the appeal should (a) be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court' and (b) be careful not to erode such discretion. He pointed out that, therefore, the sentence should only be altered if the discretion had not be 'judicially and properly exercised'.

[6] The Constitutional Court in **S v BOGAARDS**[3] recently described an appeal court's discretion to interfere with a sentence as follows:

> "It can only do so when there has been an irregularity that results in a failure of justice; the court *a quo* misdirected itself to such an extent that its decision on sentencing is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it."

[1] 1975(4) SA 855 (A) at 857d-f
[2] 2005(2) SACR 350 (WLD) at 352I-J
[3] 2013 (1) SACR 1 (CC) at [41]. See also S v Madiba [2014] ZASCA 13 (unreported, SCA case 497/2013, 20 March 2014).

[7] Mr Hoffman, correctly, submitted that the court *a quo* did take into consideration the following personal circumstances: that the Appellant was 23 years old and has three children; that, as a self-employed hairdresser, he had been a productive member of the community who supported his family; that he had already been in custody for 13 months; that his mother passed away during his incarceration; that he had passed grade 7; that he had pleaded guilty and had apologised to the Complainants, which the court accepted as a sign of remorse; and that he was a first offender.

[8] The Court considered as mitigating, furthermore, that the Appellant was still young and had succumbed to the influence of bad friends; that he had never committed crimes or had any run-ins with the law before the eleven month crime spree for which he had been sentenced; and that he had previously shown no propensity for violence or violent crime.

[9] As Mr Hoffman also submitted, the court *a quo* properly took into consideration the serious nature and gravity of the offences, the fact that weapons were used and at least one victim was seriously injured, that the victims were terrorised and severely traumatized during the incidents; that all the items stolen or robbed were luxury items; that the community had an interest in seeing such crimes punished; and that that type of crime had become prevalent. He then argued that the court *a quo* had found an appropriate balance between the seriousness of the crime, the interest of the

community and the personal circumstances of the Appellant to arrive at an appropriate and proportionate punishment, tempered as it was by ordering the sentences to run concurrently. In his submission, then, the sentence warranted no interference on appeal.

[10] Mr van der Merwe conceded that one could not disregard the fact that some of the robbery charges were accompanied by violence and that the complainants sustained serious injuries. Although he conceded, furthermore, that he could not seriously submit that substantial and compelling circumstances were present, he did point out that the Appellant clearly acted as one of a group and that it was not evident that the Appellant himself had inflicted the injuries.

The Conviction:

[11] Although the appeal lies against the sentence only, this Court needs to intervene regarding one conviction and sentence that clearly cannot stand. It is apparent from the record that the Court *a quo* committed a misdirection regarding Count 5: the Appellant should not have been found guilty of sexual assault, as embodied in the Charge Sheet, despite having pleaded guilty to that offence.

[12] On Count 5 the Appellant was charged with sexual assault as follows:

> "… in that upon or about 4 February 102 and at or near Uitsig, Bloemfontein … the said accused did unlawfully and intentionally sexually violate the complainant to wit E…….. K…… by kissing her, taking off her underwear and by touching her buttocks without the consent of the said complainant."

[13] The accused's plea explanation clearly did not cover all the elements needed for a conviction on the charge. In fact it made it clear that the said deeds were committed by Bennito and that the Appellant did not commit the acts described in the Charge Sheet. On the contrary, it clearly distanced the accused from the commission of the offence. Loosely translated, it reads as follows:

> "On count 5 I admit that I was in Uitsig, here in Bloemfontein, on 4 February 2012. I found the complainant E K….. with B……. B….. kissed and groped her. I associated myself with that and did nothing to stop him I knew what he did was wrong and therefore acquiesced in his conduct".

[14] It is trite that it is the presiding officer's duty to determine whether the accused admits all the elements of the crime as set out in the charge sheet and to satisfy himself that the accused is indeed guilty of the offence as charged[4], which did not happen in the instant case. The Appellant's conviction on Count 5 therefore cannot stand and has to be set aside. The sentence of 5 years' imprisonment imposed on him for Count 5 therefore falls away, as well.

[15] Setting aside the conviction and sentence regarding Count 5 reduces the total sentence of 100 years to one of 95 years, but, due to the way the

[4] Hiemstra's Criminal Procedure, Issue 6 at 17-4.

sentences were ordered to be served concurrently, as the order stands, the setting aside of that sentence does not have any practical effect on the effective length of the sentences, however. The Court ordered Count 5 (with a 5 year term) to run concurrently with Counts 3, 4, 6 and 10 (each of which was a 15 year term) and then ordered 3 and 4 (each a 15 year term) to run with 6 and 10 (each a 15 year term). That still leaves the 30-year effective sentence even if the 5 year sentence on Count 5 falls away.

[16] A proper enquiry where an appeal is directed at a sentence which was imposed in terms of Act 105 of 1997, as was done in at least all of the instances of Robbery with Aggravating Circumstances in the present case, according to the court in **S v PB**[5] needs to focus on whether the facts considered by the trial court had been substantial and compelling or not. As held in **S v MALGAS**[6]**,** in addition, the court of appeal should consider all other circumstances bearing on the question (See also: **S v GK**[7]) to enable it to assess the trial court's finding and determine the proportionality of the sentence. In ***S v Malgas,***[8] the court held that:

> "If the sentencing court in consideration of all of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."

5 2013(2) SACR 533 (SCA) at [20].
6 2001 (1) SACR 469 (SCA)
7 2013 (2) SACR 505 (WCC) at [71]
8 2001 (1) SACR 469 (SCA) at par [12].

[17] I have to agree with Mr Hoffman that the aggravating circumstances in the present case outweigh the mitigating factors to the extent that there are no substantial and compelling circumstances to justify the imposition of lesser sentences than the prescribed ones of 15 years' imprisonment for first offenders in relation to the four convictions of Robbery with Aggravating Circumstances and the 10 years' imprisonment for the Kidnapping and the Attempted Murder convictions, respectively. As the trial court stated during sentencing with reference to the Appellant's 11-month crime spree and 'the heinous nature of the crime':

> 'The offence itself … is very, very serious' … It is very prevalent in this area … you virtually held the Uitsig area in Bloemfontein at your pedal, you had them completely on their knees in that area … then you went a step further just robbing the people or stealing from the people was not enough, you deliberately set out to hurt them also. Like the kidnapping, like the sexual assault and the attempted murder counts that you have pleaded guilty to."

[18] Regarding Count 3, the Appellant in his statement admitted that he used a sharp object to injure the complainant. Regarding Count 4 he admitted using a panga to instil fear in the victim to force her to hand over her possessions. Regarding Count 6 he admitted using a panga to instil fear in his victims in order to rob them. Regarding Count 7 he admitted having deprived those same victims and their children of their freedom by forcing them into their vehicle and forcing them to drive out of Uitsig. Regarding Count 10 he admitted having assaulted one victim and having used violence to rob both his victims. Regarding Count 11 he admitted having attempted to kill his victim by repeatedly striking him with a panga and injuring him seriously.

[19] The lasting and debilitating impact of the Appellant's deeds on his victims emerged from the testimony of one of his victims in aggravation before he was sentenced. Mrs K…… (Count 5) described how her young son was forced into her room with a panga at two in the morning when she was alone in the house with her three children and how the Appellant told her: "I want to kill at least one tonight". She was told to choose which one. All four of them had to be hospitalised for trauma counselling.

[20] Regarding the guilty pleas on all charges, furthermore, Mr Hoffman submitted that that was no sign of true remorse, since the State had such a good case against the Appellant due to fingerprint evidence, that he had no other choice than to plead guilty. At best it could therefore have been a neutral factor. The court *a quo* did inform the Appellant that in view of his youth and his evidence in mitigation that he was influenced by bad people, and the fact that he was a first offender, moved the court to temper the totality of the sentences with an order of concurrency.

[21] When a sentence is imposed for each of a multiple of offences, as *in casu,* a cumulative effect may develop and render the combined punishments too severe. As Terblanche stated[9]: 'it can give a false picture of the totality of the offender's criminal conduct to the point where the total punishment is more than is required by his blameworthiness.'

[22] To illustrate this, Terblanche quoted with approval from **S v MPOFU**[10]:

[9] Guide to sentencing in South Africa, 2nd Edition, at 179
[10] 1985 (4) SA 322 (ZHC) at 324 G.

> '[i]n all multiple crime cases the courts pay regard to what *Thomas* describes as 'the totality principle'. (The Court) must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences.' … In effect, the accused normally receives a 'discount' for bulk offending, particularly where the various counts are similar in nature, for the imposition of a separate and consecutive sentence for each individual charge would result in a very high aggregate penalty which would be disproportionate to the moral blameworthiness of the accused having regard to his line of conduct as a whole.'

and added that:

> Reducing the cumulative effect is part of the sentencing decision as a whole, which is determined by the sentence discretion, based on all circumstances of the case. The mere fact that there is more than one offence does not mean that the court has to impose lesser sentences. The sentencing officer should consider all the circumstances, look at the totality of the criminal behaviour and determine how the cumulative effect should be prevented."

[23] The court *a quo* therefore correctly took into consideration several weighty mitigating circumstances, such as the Appellant's youthful age and the fact that he was a first offender to temper the totality of the sentences by ordering them all to run concurrently rather than to impose lesser than the prescribed sentences. The cumulative effect of all of the sentences, namely a 100 years' imprisonment was indeed shocking enough for the court *a quo* to have to find such a way of bringing about a fair and adequate sentence[11]. As Theron JA said in **S v MOSWATHUPA[12]:**

> "Where multiple offences need to be punished, the court has to seek an appropriate sentence for all the offences taken together. When dealing with multiple offences a court must not lose sight of the fact that the aggregate penalty must not be unduly severe."

[11] S v Pute 1990 (1) SACR 339 (C)
[12] 2012 (1) SACR 259 (SCA) at [8].

[24] Even though *in casu* we are dealing with an effective sentence achieved by ordering concurrency, Plasket J's reference in **S v VELEBHAYI**[13] to Trollip J's remark in ***S v Young***[14] would still be applicable, namely:

> 'Despite the gravity of the individual offences, is the cumulative effect of these sentences too harsh?"

For, as Chetty J in **S v DUBE**[15] stated, where the cumulative effect of a number of sentences strikes one as excessive, appellate interference is warranted. No doubt the same would apply if the end result of an order that a number of sentences are to run concurrently still strikes one as excessive.

[25] In **S v MULLER**[16] where the appellants were 24 and 29 years old when they committed the crimes, for instance, the Supreme Court of Appeal held that '[a]n effective sentence of 30 years' imprisonment was an extremely severe punishment that should be reserved for particularly heinous offences.' The appellants in that case had originally been convicted on three counts of robbery with aggravating circumstances, after three businesses within a two kilometre radius were robbed at gunpoint in one month. In all of the robberies the victims were threatened with a firearm and in the third the 77-year old victim who was recovering from broken ribs sustained in an accident was punched in the head, thrown on the floor and repeatedly kicked in the ribs while the appellants threatened to shoot him. He was traumatised and still suffered from nightmares a year later at the trial. The court *a quo* had sentenced the

[13] 2015 (1) SACR 7 (ECG) at [32]
[14] 1977 (1) SA 602 (A) at 611 C - D
[15] 2012 (2) SACR 579 (ECG) at [11]
[16] 2012 (2) SACR 545 (SCA) at [10]

accused to 10 years' imprisonment on each of the three counts. That resulted in an effective sentence of 30 years' imprisonment.

[26] In setting aside the effective sentence of 30 years, which he found to be 'far too severe and disturbingly inappropriate … the effect of which is more likely to destroy than to reform' and imposing one of 18 years instead by ordering concurrency, Leach JA described the offences as 'not falling within the upper echelons of the scale of severity'. He held the offences, 'even viewed in their totality', not to be the 'particularly heinous' offences which would justify the extremely severe punishment of an effective sentence of 30 years' imprisonment[17]. He concluded that, although severe, they were not associated with the level of extreme violence or loss of life that all too often occurs in armed robberies. *In casu* the offences also did not fall in the category of the most heinous crimes, but they were certainly more serious than those in ***S v Muller.***

[27] Leach JA cautioned that a sentencing court, when dealing with multiple offences, must have regard to the totality of the offender's criminal conduct and moral blameworthiness in determining an effective and proportional sentence.[18] With reference to what Holmes JA said in ***S v Harrison[19]*** namely that mercy and not a sledgehammer is the concomitant of justice, he stated that while punishment and deterrence are indeed of utmost importance when imposing sentences for armed robbery, a judicial officer in doing so 'should approach his task with a humane and compassionate understanding of human frailties and

[17] *Supra,* at [10] at 550b-c
[18] *Supra,* at [9] at 549c-i
[19] 1970 (3) SA 684 (A) at 686A.

the pressures of society which contribute to criminality'[20]. He warned, furthermore, that an offender should not be sacrificed on the altar of deterrence even though it is in the interest of the community that a sentence for armed robbery should act as a deterrent to others.

[28] He relied, furthermore, on Nicholas JA's remark in ***S v Skenjana***[21] that:

> "A sentence of 20 years' imprisonment is undoubtedly very severe … My personal view is that the public interest is not necessarily best served by the imposition of very long sentences of imprisonment. So far as deterrence is concerned, there is no reason to believe that the deterrent effect of a prison sentence is always proportionate to its length. Indeed, it would seem to be likely that in this field there operates a law of diminishing returns: a point is reached after which additions to the length of the sentence produce progressively smaller increases in deterrent effect, so that, for example, the marginal deterrent value of a sentence of 20 years over say 15 years may not be significant.
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> …
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> Nor is it in the public interest that potentially valuable human material should be seriously damaged by long incarceration. As I observed in *S v Khumalo and Another* 1984 (3) SA 327 (A) at 331, it is the experience of prison administrators that unduly prolonged imprisonment brings about the complete mental and physical deterioration of the prisoner."

[29] The effective 18 years' imprisonment, Leach JA stated, would reflect the public's righteous indignation, act as a deterrent, punish the appellants and hopefully induce them to walk a straight path when released back into society. I am of the view that in the instant case where the Appellant was 23 when he committed the offences and was a first offender, in view thereof that there were more offences and that the offences grew progressively more violent, an effective sentence of 25 years' imprisonment would be the most appropriate

[20] Corbett JA in S v Rabie 1975 (4) SA 855 (A) at 866B-C.
[21] 1985 (3) SA 51 (A) at 541I – 555J

and proportional to the crimes, while still accomplishing all the feats described by Leach above. In my view it would encompass a measure of mercy and allow for rehabilitation. It would, in addition, allow the setting aside of the 5 year sentence erroneously imposed on Count 5 to have a practical effect on and be reflected in the effective sentence.

[30] Binns-Ward, J, in ***S v Fortune***[22] found it "*appropriate for a sentencing court to have regard to the gradation in the manifestations of the listed offence"* of robbery with aggravating circumstances which are set out in ss 1(b)(i) to (iii) of the Criminal Procedure Act 51 of 1977 to determine an appropriate sentence. The court held that:

> "the fact that the complainant was threatened rather than physically assaulted and injured is a relevant factor to be taken into account, along with all the other factors that should be weighed in determining whether a departure from the prescribed sentence is warranted".

[31] The structure of the concurrency order would allow, in my view, for the gradation of the different ever more violent manifestations of the aggravating circumstances in the robberies *in casu* to be reflected in the order.

[32] An effective sentence of 25 years' imprisonment will be achieved by adding a further order of concurrency and ordering 5 years of count 6 to run concurrently with count 10.

WHEREFORE THE FOLLOWING ORDER IS MADE:

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[22] S v Fortune, *supra,* at [12] at 187h-i

1. The appeal succeeds. The order of the court *a quo* is set aside and replaced with the following:

    a. The appeal succeeds only to the extent set out in (b) and (c) below;
    b. The conviction on Count 5 and the concomitant sentence of 5 years' imprisonment imposed on Count 5 are set aside.

    c. The sentences are otherwise confirmed as is the order of concurrency, with an additional order that 5 years of the sentence on count 6 is to run concurrently with the sentence on count 10 to result in an effective term of imprisonment of 25 (TWENTY-FIVE) years.

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H MURRAY, AJ

I concur and it is so ordered.

_____
B C MOCUMIE, J

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